IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Writ Petition No.4438 of 2006

Hashan Abbas Sayyad Petitioner

Vs.

Usman Abbas Sayyad & ors. Respondents

Mr.S.R.Ganbavale for petitioner.

Mr.G.S.Godbole for Resp.Nos.1 and 2.

Mr.S.G.Karandikar for Resp.No.3.

CORAM: B.H.MARLAPALLE,J.

July 18, 2006.

P.C.

. Heard Mr.Ganbavale, the learned counsel for the petitioner, Mr.Godbole, the learned counsel for the Respondent Nos.1 and 2, who are three blood brothers. Mr.Karandikar appears for respondent no.3. This petition under Article 227 of the Constitution arises from an order passed below Misc. Application No.30 of 2006 in Special Darkhast No.289 of 1999. The learned Jt.Civil Judge, Senior Division at Pune by order dated 15/4/2006 was pleased to reject the Misc. Application No.30 of 2006 filed by the

petitioner. The said application was filed under Section 47 of the CPC by the petitioner who was original defendant no.1 in SCS No.764 of 1993. The said suit for partition and separate possession was decided on 16/3/1999 and the operative part of the judgment read as under:

"1. Suit of the plaintiff is hereby decreed.

2. It is hereby declared that, plaintiff and defendants have 1/3rd share each in the suit property.

3. The Court Commissioner w appointed for the partition of the suit property.

4. Parties will be placed in possession after receipt of Court Commissioner's report.

5. Parties to bear their own costs.

6. Decree be drawn up accordingly."

. The defendant no.1 by filing an application under Section 47 of CPC contended that the Special Darkhast registered was required to be dismissed as there was no final decree and what was issued by the trial Court was only a preliminary decree on 16/3/1999.

. The learned Judge of the lower Court agreed with the contentions of the petitioner that the final decree was not passed and it was only a preliminary decree as quoted hereinabove. However, the Court proceeded to consider whether Special Darkhast No.289 of 1999 was maintainable. By considering the earlier orders passed in the Special Darkhast it noted that the application though registered as a Special Darkhast was treated as an application for issuance of a final decree. This observation is based from the order dated 14/12/2005 passed below Exhibit 60. Admittedly this order dated 14/12/2005 rejecting the application at Exhibit 60 is already a subject matter of challenge before this Court in Writ Petition No.1096 of 2006 and there is no stay to the said order as yet granted by this Court.

. The Court Commissioner was appointed who

submitted his report in Special Darkhast No.289 of 1999 and concluded that the suit property could not be partitioned by metes and bounds. The Court Commissioner, therefore, recommended the sale of the suit property and the proceeds to be divided amongst three brothers as per the preliminary decree i.e. 1/3rd share each. The petitioner offered to buy the shares of the other two brothers and this offer was accepted by the Court below. However, the petitioner, on account of lack of financial resources, could not honour his own offer and, therefore, the Court was left with no choice but to proceed with the sale of the suit property as none of the other two brothers have offered to buy the same. The proceeds of auction will be deposited in the Court below in the pending proceedings and thereafter a final decree indicating the amount payable to each brother will be issued.

. Thus the reasoning given by the learned 2nd Jt.Civil Judge, Senior Division at Pune in the impugned order dated 15/4/2006 in rejecting the application filed by the petitioner cannot be said to be perverse or grossly erroneous so as to call for interference in a petition under Article 227 of the

Constitution. The petition is rejected summarily.

. The oral application for stay is hereby rejected.

(B.H.MARLAPALLE,J.)